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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/700,863	11/21/2000	Philip Edwin Howse	A0-1269	2839

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EXAMINER

ROSENTHAL, DANIELLE S

ART UNIT	PAPER NUMBER
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3644

DATE MAILED: 12/10/2001

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/700,863

Applicant(s)

HOWSE, PHILIP EDWIN

Examiner

Danielle S. Rosenthal

Art Unit

3644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-57 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-57 is/are rejected.
- 7) ☒ Claim(s) 48, 51 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☒ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

Specification

1. This application does not contain an abstract of the disclosure as required by 37 CFR 1.72(b). An abstract on a separate sheet is required.
2. The following guidelines illustrate the preferred layout and content for patent applications. These guidelines are suggested for the applicant's use.

Arrangement of the Specification

The following order or arrangement is preferred in framing the specification and, except for the reference to "Microfiche Appendix" and the drawings, each of the lettered items should appear in upper case, without underlining or bold type, as section headings. If no text follows the section heading, the phrase "Not Applicable" should follow the section heading:

- (a) Title of the Invention.
- (b) Cross-References to Related Applications.
- (c) Statement Regarding Federally Sponsored Research or Development.
- (d) Reference to a "Microfiche Appendix" (see 37 CFR 1.96).
- (e) Background of the Invention.
 1. Field of the Invention.
 2. Description of the Related Art including information disclosed under 37 CFR 1.97 and 1.98.
- (f) Brief Summary of the Invention.
- (g) Brief Description of the Several Views of the Drawing(s).
- (h) Detailed Description of the Invention.
- (i) Claim or Claims (commencing on a separate sheet).
- (j) Abstract of the Disclosure (commencing on a separate sheet).
- (k) Drawings.
- (l) Sequence Listing (see 37 CFR 1.821-1.825).

Claim Objections

3. Claim 48 and 51 are objected to because of informalities. It is unclear if claim 48 should depend upon claim 27 or claim 47. Claim 51 states that the

particulate material "form" a pest trap. "Form" should be changed to "from."

Appropriate correction is required.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claims 1-22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 1 ends with "to render the material airborne by the movement off the pest on, above, or in the region of the particulate material-bearing surface." This section fails to distinctly point out the subject matter. It is unclear what is meant by rendering the material airborne by the movement off the pest on, above, or in..." Since claim 1 is indefinite, claims 2-22 are indefinite because they depend on claim 1.

Claim Rejections - 35 USC § 102

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 1-4, 7-9, 12-20, 22-26, 29-31, 34-40, 42, 44-48, 51-55 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by U.S. Patent No. 5,189,831 to Miller et al.

Referring to claim 1-4, Miller et al. disclose a method of covering or partially covering an insect pest with a biological particulate material, fungi, which are used to kill the insect (see Miller et al., claim 7). The particulate material is considered an airborne material because the fungus spores contact and stick to the insect when the insect leaves or enters the particulate material surface. It is noted that the term, "particulate," is interpreted as "any substance composed of different particles" and hence fungus spores are considered particulate. Further, the term "powder" is interpreted as "any substance composed of particulate matter," and hence fungus spores are considered powder.

Referring to claims 7 and 8, Miller et al. disclose a chamber that acts as a surface for containing the particulate materials (see page 4, lines 30-60). The surface is made of an inexpensive material, which includes plastic and thus is an electrically insulating material.

Referring to claim 9, Miller et al. disclose a method for luring insects that includes using fungus spores as the lure material and further this method includes a pheromone to enhance the ability to attract insect to the chamber (see claim 12).

Referring to claims 12-18, Miller et al. disclose a method that consists of a trap with a chamber where the fungus spores are contained. The chamber is considered a recess or trough and is supported by raised sidewalls. These

considered a recess or trough and is supported by raised sidewalls. These sidewalls prevent the loss of the material from the bottom surface of the chamber (see Fig. 1). The surface bottom is smooth and thus the chamber can stand alone.

Referring to claim 19, Miller et al. disclose a method that includes a trap with recesses on the sides to allow insects to access the trap. Insects vary in their sizes. The recesses disclosed may be larger than a small insect such as a housefly but may be too large for a cockroach and thus the recess would qualify as being smaller than that of the pest.

Referring to claim 20 and 22, Miller et al. disclose a method that contains an interior surface that is part of a tubular trap (see Fig. 1)

Referring to claims 23-26, Miller et al. disclose an apparatus that contains a region or chamber where particulate material, fungi, is contained (see claim 1). Upon contact with the spores, the insect is partially covered with the spores and this renders the spores as airborne. The fungus spores are considered powder because they are composed of particulate materials. The fungi eventually kill the insect and thus act as a biological pesticide.

Referring to claim 29 and 30, Miller et al. disclose an insect trap that is composed of inexpensive or plastic material and thus the trap is composed of electrically insulating material (see page 4, lines 30-60).

Referring to claim 31, Miller et al. disclose an insect trap, which, in addition to containing a biological agent to lure the insect, contains a pheromone. (see claim 12).

Referring to claims 34-40, Miller et al. disclose an insect trap that consists of a chamber or recess that contains the biological agents. This recess has raised edges on the periphery of the bottom surface or plate to retain the agents and reduce the loss of the powder. The bottom of this plate is smooth and thus is designed to stand alone.

Referring to claim 42 and 44, Miller et al. disclose an apparatus for trapping and killing insects and the device consists of a surface that is part of a tubular trap. Further the bottom surface that contains the biological agents is an interior surface of the trap (see Fig. 1).

Referring to claim 45, Miller et al. disclose an insect trap that contains at least one recess, which contains a particulate material, fungus spores, which act as a biological pesticide.

Referring to claim 46, Miller et al. disclose a trap with recesses on the outside of the central chamber. While these recesses may be larger than small insects such as ants and houseflies, these recesses may be too large for certain types of insects, such as cockroaches. Therefore, the recesses may be smaller than a pest being controlled.

Referring to claim 47 and 48, Miller et al. disclose an insect trap with a recess. This recess consists of a chamber for containing particulate materials such as fungus spores (see Fig. 1). The spores are considered powder because they are a collection of particulate materials. The spores are also considered airborne material because when the insect comes in contact with the spores, the

spores travel through the air by traveling from the surface of the recess to the insect.

Referring to claims 51-55, Miller et al. disclose a method for preventing the loss of particulate material with at least one recess in a surface, which contains the particulate material (see Fig. 1). This particulate material is considered a powder because the spores are a collection of particles. The powder is prevented from wind action because it is housed in a chamber with raised edges. This material is transferred from the surface of the recess to a flying insect when the insect lands and takes off from the surface.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

9. Claims 21 and 43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Miller et al. in view of U.S. Pat. No. 5,927,001 to Ballard et al. Ballard et al. disclose an insect trap that is triangular and consists of an interior chamber and a triangular roof (Fig. 1). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the method and device for controlling insects by changing the insect trap apparatus from a cylindrical or tubular shape to another appropriate shape such as a shape with a triangular cross section.

Double Patenting

10. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

11. Claims 1-57 are rejected under the judicially created doctrine of double patenting over claims 1-23 of U. S. Patent No. 6,041,543 to Howse, since the claims, if allowed, would improperly extend the "right to exclude" already granted in the patent.

The subject matter claimed in the instant application is fully disclosed in the patent and is covered by the patent since the patent and the application are claiming common subject matter, as follows:

Referring to claims 1-57, Howse discloses a method and trap where flying insects or insect pests are partially covered with an electrostatically charged particulate or powder material (see Howse, claim 21). This powder is capable of being airborne and the powder is composed of a biological pesticide and can be charged by friction. The powder is contained for long periods of time in a recess in an electrically insulating surface. The surface composes a chamber that has

raised edges to prevent loss of the powder (see Fig. 1). The chamber is capable of resting on a smooth surface and thus stands alone.

Referring to claims 19 and 46, Howse discloses a method and apparatus with an aperture for allowing insects to access to the powder. Although the recess may be larger than a housefly or mosquito, the recess may not be as large as certain types of cockroaches. Therefore, the recess may be considered to be smaller than the type of control pest used.

Referring to claims 21 and 43, it is noted that although the shape of the trap disclosed is tubular, it is obvious to vary the shape and include a trap that is triangular.

Furthermore, there is no apparent reason why applicant was prevented from presenting claims corresponding to those of the instant application during prosecution of the application which matured into a patent. See *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). See also MPEP § 804.

Conclusion

12. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

U.S. Pat. No. 6,195,934 B1 to Megargle et al. disclose a termite bait station that contains a slow acting toxicant.

U.S. Pat. No. 6,145,236 to Kind discloses an insect repelling device that consists of a mat portion with a recess for containing insect pesticide and pheromones.

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Danielle S. Rosenthal whose telephone


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number is (703) 305-2765. The examiner can normally be reached on M-Th & every other F, 8:00 am-5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Charles Jordan can be reached on (703) 308-2484. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-7687 for regular communications and (703) 305-7687 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1113.

dsr
12/04/01


CHARLES T. JORDAN
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